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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of) MM DOCKET NO. 93-75
)
TRINITY BROADCASTING OF)
FLORIDA, INC.) File No. BRCT-911001LY
)
For Renewal of License of)
Station WHFT(TV) (Channel 45),)
Miami, Florida)
GLENDAL BROADCASTING COMPANY) File No. BPCT-911227KE
)
For a Construction Permit for)
a New TV Station on Channel 45)
at Miami, Florida)

To: Administrative Law Judge
Joseph Chachkin

MASS MEDIA BUREAU'S REPLY TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Summary

The Bureau believes that its Proposed Findings of Fact and Conclusions of Law in this proceeding reflect a fair analysis of the relevant facts and application of the prevailing law. The Bureau continues to believe that the application of Trinity Broadcasting of Florida, Inc., for renewal of license of Station WHFT(TV), should be granted; that the competing application of Glendale Broadcasting Company, for a new commercial television station on Channel 45 in Miami, should be denied; and that Trinity Broadcasting Network and National Minority TV, Inc. should receive a forfeiture in the amount of \$250,000 each.

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I. Preliminary Statement

1. On August 15, 1994, Trinity Broadcasting of Florida, Inc., Spanish American League Against Discrimination ("S.A.L.A.D") and Glendale Broadcasting Company ("Glendale") filed Proposed Findings of Fact and Conclusions of Law ("PFCs"). The Mass Media Bureau hereby replies to those PFCs. The Bureau's failure to reply to any particular finding or conclusion contained in the other parties' PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its own proposed findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent to the facts of this proceeding.

II. Reply Findings

A. Trinity¹ Issues

1. Trinity's Alleged Lack of Candor

2. On p. 350 of its PFCs, Glendale charges that Trinity lacked candor in contending that there was a nexus between NMTV's formation and Paul Crouch's desire to implement a perceived FCC goal of promoting minority ownership. Although the principal reason Crouch

¹ For the sake of simplicity, the Bureau will refer to Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network ("TBN"); Trinity Broadcasting of Florida, Inc. ("TBF"); and National Minority T.V., Inc. ("NMTV") as Trinity unless it is necessary to specify otherwise. Also, for the sake of simplicity, the Bureau will generally refer to Translator T.V., Inc. ("TTI") and NMTV as NMTV.

formed NMTV was to create a new vehicle for carrying TBN programming (see Bureau PFCs at pp. 8-12, 135-36), it cannot be concluded that Trinity's claims as to why NMTV was formed constitute deceit. When NMTV was formed some 14 years ago as TTI, Crouch believed that a company with a board having a majority of minority directors furthered a Commission goal of increasing minority ownership. TBF Ex. 104, p. 9. Crouch, Pearl Jane Duff and Phillip David Espinoza, NMTV's original directors, initially viewed NMTV as a company which would, at least in theory, be "owned" by minorities.² TBF Ex. 101, p. 23; TBF Ex. 104 p. 109; TBF Ex. 106, pp. 3-4. Accordingly, it cannot be concluded Trinity lacked candor by claiming that one of the purposes underlying NMTV's formation was the promotion of minority ownership.

3. Glendale and S.A.L.A.D. claim (Glendale PFCs at pp. 33, 351-52; S.A.L.A.D. PFCs at p. 3) that Duff's February 1984 certifications in which NMTV claimed a diversification preference (MMB Ex. 72) constituted a misrepresentation and/or an abuse of process. Glendale and S.A.L.A.D. believe that NMTV's diversification claims could be valid only if Janice Crouch, as a director of TBN, acted independently of her husband, Paul Crouch. Glendale and S.A.L.A.D. contend that because Janice Crouch gave Paul Crouch a proxy to vote at TBN directors' meetings almost immediately after her election to TBN's board, she never acted as a director and that Duff and Colby May knew that Janice Crouch was not a true director.

² A non-stock corporation such as TTI/NMTV, of course, has no "owners" in the traditional sense. It has a board of directors whose members hold certain specific rights granted to them by the company's articles and bylaws.

4. As discussed in the Bureau's PFCs at pp. 19-22, it appears that several factors led to Janice Crouch's election to TBN's board of directors in May 1983. However, there is no evidence that when Duff certified some nine months later that NMTV was entitled to a diversification preference, Duff or May believed that Janice Crouch did not qualify as a director of TBN. Thus, the evidence does not support Glendale's and S.A.L.A.D.'s claims. In addition, neither Glendale nor S.A.L.A.D. moved to enlarge the issues to explore whether TTI's diversification claim constituted a misrepresentation or an abuse of process. Absent the addition of an appropriate issue, Glendale's and S.A.L.A.D.'s arguments cannot be used to justify denial of TBF's license renewal application for Station WHFT(TV). See RKO General, Inc. v. FCC, 670 F.2d 215, 231-36 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

5. In its PFCs at pp. 42-44, Glendale charges Trinity with lack of candor in connection with testimony pertaining to the events that occurred shortly before NMTV filed its application to acquire the construction permit of the unbuilt station in Odessa, Texas. In Glendale's view, Duff lied when she testified (TBF Ex. 101, p. 30) that she had called Espinoza, then NMTV's third director, before making the agreement with Alfred Roever to acquire the permit, because Espinoza did not learn of the decision to acquire the permit until after the agreement to do so had been signed.

6. The evidence as to when Espinoza learned of the proposed acquisition is not as clear as Glendale suggests. See Bureau's PFCs at p. 36. Moreover, Espinoza's testimony

concerning a conversation with Duff does not contradict Duff's testimony. TBF Ex. 106, pp. 6-7; Tr. 4202. Thus, it appears that Espinoza's opinion was sought by Duff at some point prior to the time the application to acquire the Odessa permit was filed. Accordingly, there is an insufficient basis for concluding that a disqualifying lack of candor occurred.

7. In its PFCs at pp. 164-65, Glendale submits that Norman Juggert's direct testimony (TBF Ex. 108) lacked candor. The Bureau disagrees. Glendale's argument is premised on the claim that Juggert's direct testimony listed every instance of legal help he gave to NMTV, while his testimony on cross examination revealed many more examples of service. However, Glendale's argument founders because Juggert did not claim in his direct testimony that the legal services listed there constituted the universe of services he provided to NMTV.

8. Glendale and S.A.L.A.D. submit that NMTV lacked candor when it failed to fully set forth the nature and extent of its relationship with TBN in several NMTV submissions wherein it responded to charges that TBN controlled NMTV. Glendale PFCs at pp. 173-82, 359-63; S.A.L.A.D. PFCs at pp. 25-27. Glendale and S.A.L.A.D. contend that the Commission had to submit two inquiries to NMTV before NMTV revealed pertinent details of its financial arrangements with TBN and the extent of NMTV's reliance on TBN for engineering services. Among other things, Glendale and S.A.L.A.D. fault NMTV for allegedly falsely claiming reliance on bank financing for its Wilmington purchase; its overly vigorous defense of Phillip Russell Aguilar's performance as a director of NMTV; and its

failure to disclose the extent of E. V. Hill's involvement with TBN prior to his becoming a director of NMTV.

9. Plainly, NMTV did not disclose the full extent of its relationship with TBN in its opposition to the petition to deny its acquisition of Station WTGI(TV), Wilmington, Delaware. See Bureau PFCs at pp. 54-55. Likewise, NMTV's September 24, 1991, response (TBF Ex. 121) to the Commission's September 13, 1991, inquiry (Glendale Ex. 196) was far from ideal, especially with respect to: Duff's reference to tax reports (which omitted any reference to NMTV returns prepared by TBN and its accountants); her reference to local programming (which suggested that NMTV already had broadcast or had specific plans to broadcast some local programming not otherwise broadcast by TBN); and her reference to employment practices (which again suggested something distinct about NMTV's hiring practices). See TBF Ex. 121 at pp. 14-15. Finally, in its Request for Declaratory Ruling, NMTV did not accurately set forth Aguilar's record as a director.

10. Nevertheless, the evidence does not support a conclusion that these failures to acknowledge NMTV's dependence on TBN resulted from an intent to deceive the Commission. Rather, it appears that they occurred because NMTV persisted in relying on the ill-conceived theory that NMTV's directors need only "own" but not control NMTV. E.g., TBF Ex. 121, pp. 1-2. As explained in the Bureau's PFCs at pp. 54-55, 159, NMTV's unreasonable reliance on the gross misreading of the multiple ownership rules supports the conclusion that NMTV abused the Commission's processes when it filed its

Odessa, Portland and Wilmington applications. See also Bureau PFCs at pp. 37-38, 46-48, 52-54, 151-55.

2. Trinity's *De Facto* Control of NMTV

11. In an effort to demonstrate the role and independence of Espinoza as an NMTV director, Trinity submits that when NMTV filed its first set of applications for television translator stations, Espinoza "made suggestions about areas of the country with which he was familiar and was particularly interested in serving ... large populations of minorities, particularly Hispanic." Trinity PFCs at p. 13. However, there is no documentary evidence in this proceeding which suggests that anyone other than Trinity employees and consultants had any significant role in determining markets for NMTV's proposed stations or preparing its applications. Bureau PFCs at pp. 13-14. Indeed, NMTV held no board meetings between its organizational meeting on September 19, 1980, which Espinoza did not attend and which preceded the preparation of any NMTV application, and February 1982, more than a year after the last NMTV television translator application was filed. Even then, there is no record that NMTV's applications were the subject of discussion among its board members. Bureau PFCs at pp. 14-15. It thus appears that Espinoza had virtually no role in choosing the communities for which NMTV filed applications in 1980 and 1981. See also, Glendale PFCs at p. 23.

12. In its PFCs at p. 399, Trinity submits that the starting point for determining whether Trinity exercised *de facto* control over NMTV is June 9, 1987, when the

Commission granted NMTV's application to acquire what became Station KMLM(TV), Odessa. Trinity also posits at p. 400 of its PFCs that, because Commission policy permitted and encouraged Crouch and TBN to have substantial influence in NMTV, one can conclude that Crouch and TBN crossed the line from permitted influence to prohibited control only by finding that they *acquired* the right to determine the basic operating policies of NMTV.

13. Trinity is wrong. The relevant time period for determining whether or not Trinity exercised *de facto* control of NMTV begins with Crouch's conception of TTI. Moreover, to fully assess or understand NMTV's relationship with TBN and thereby determine whether *de facto* control was exercised by TBN, it is necessary to examine the history of TTI/NMTV. That history graphically illustrates the dominant role TBN played in TTI's early years and provides the necessary background to understand and assess TBN's continued control of NMTV in the years following its acquisition of full power television stations in Odessa and Portland. The history of their relationship also shows that the proper question is not whether Crouch and TBN ever acquired the right to determine NMTV's policies but whether they ever relinquished the power they had from the outset over TTI. The overwhelming weight of the evidence supports the conclusion that, virtually throughout the existence of TTI/NMTV, Crouch and TBN used NMTV to serve TBN goals. See Bureau PFCs at pp. 8, 13 n. 6, 15-18, 28-29, 33, 38-39, 42-45, 48, 52-54, 56-59.

14. Thus, in assessing whether Crouch and TBN exercised *de facto* control over NMTV, it is relevant that Crouch created TTI, not primarily to increase minority ownership

in the mass media, but to give Trinity another means of spreading its religious message by taking advantage of proposed preferences for television translator applicants. Bureau PFCs at pp. 8, 135. It is relevant that TBN never opened a bank account for TTI with funds obtained from telethons and newsletter solicitations conducted between 1980 and 1983 and that Espinoza never questioned the state of TTI's finances during that period. Bureau PFCs at pp. 15-18, 139-40. It is relevant that TBN's newsletter characterized Espinoza as a director of its satellite division. Bureau PFCs at pp. 16, 148. It is relevant that when construction permits for television translator and low power television ("lptv") stations became available in 1983, TBN chose to buy them and no one at TTI sought to do so. Bureau PFCs at pp. 28-29, 143; Trinity PFCs at pp. 16-17. It is relevant that, between 1980 and 1987, TTI appeared in TBN's corporate financial statements, attended TBN annual directors' meetings, and elected as assistant secretaries the same persons elected to hold the office of assistant secretary for the Trinity owned and operated companies. Bureau PFCs at pp. 14-15, 18, 140, 144-45.

15. Likewise, in assessing whether Crouch and TBN ever relinquished control of NMTV, it is significant to note that, until the May 1991, petition to deny, NMTV received money from TBN in virtually the same manner as Trinity-named corporations received money. It is significant that Duff's role with NMTV is not appreciably different from her role vis-a-vis the Trinity-named companies. It is significant that, irrespective of what they said, May, Juggert and W. Benton ("Ben") Miller virtually always acted as if TTI/NMTV was simply a member of TBN's family of companies. Bureau PFCs at pp. 12, 23, 57-59,

68, 72-75, 145-46, 148-49; Glendale PFCs at pp. 161-65. It is significant that, no matter how much time they spent on NMTV matters, the salaries of TBN employees were never affected. E.g., Bureau PFCs at p. 52.

16. Trinity argues in pp. 399-444 of its PFCs that the Commission has not found the exercise of *de facto* control in a wide variety of settings. Trinity cites numerous cases in which one or some combination of actions pertaining to the control of a licensee has been approved by the Commission. Trinity thus concludes that Crouch's and TBN's activities on behalf of NMTV merely constituted the kind of influence that the Commission has permitted, and, in the context of the multiple ownership rules, encouraged.

17. The ultimate conclusion as to whether or not *de facto* control exists has traditionally been reached on a case-by-case basis. See, e.g., Turner Broadcasting System, Inc., 101 FCC 2d 843, 848 (1985). The evidence in this case shows that NMTV was created by Crouch and TBN. Crouch and TBN have used NMTV throughout its history as an outlet of TBN programming. In this regard, TBN employees and consultants have always dictated NMTV's application strategy, and TBN has continuously held out NMTV to the public as a TBN programmer. NMTV has always been totally dependent on TBN's financial generosity; NMTV has acted or refrained from acting in accordance with TBN's willingness to make money available. NMTV has always been operated and overseen by TBN, and former TBN, employees.

18. Thus, in considering whether TBN has exercised *de facto* control with respect to NMTV's programming, it is of little moment that the program affiliation agreements, by themselves, do not convey control or that they may have given NMTV certain rights available to no other Trinity programmer. Trinity PFCs at pp. 402-05. The terms of the agreements must be assessed in light of how the agreements were created, and how NMTV's stations have been programmed. The evidence reveals that the affiliation agreement relative to NMTV's Odessa station was never signed by both parties to that agreement, while the affiliation agreement for NMTV's Portland station never led to a documented discussion among NMTV's board as to what programming should be aired or would be aired until after NMTV's attempt to acquire a television station in Wilmington was challenged by the May 10, 1991, Dan Borowicz petition to deny ("Borowicz petition"). Bureau PFCs at pp. 42, 50, 54, 147; MMB Ex. 377; MMB Ex. 386. Indeed, contrary to Trinity's self-serving claims that plans for local programs for Portland had been discussed long before NMTV's status as an alter-ego of Trinity was questioned in the Borowicz petition, it appears that NMTV had not yet formulated one single program. Compare Trinity PFCs at p. 132 with MMB Ex. 358. Finally, there is no evidence that any affiliation agreements were prepared or executed for any of NMTV's television translator or lptv stations. Every NMTV station simply broadcast the full slate of TBN programming because that is what they were expected to do. Bureau PFCs at pp. 57-58, 147. Hence, TBN had and exercised control over NMTV's programming.

19. With respect to TBN's involvement with NMTV personnel decisions, the plain

fact of the matter is that every aspect of NMTV station operations has always been overseen by TBN employees. Duff, who during the relevant period always held the role of assistant to TBN's president, oversaw the non-technical functions of NMTV's full power broadcast stations. Bureau PFCs at pp. 44, 51, 144. Miller, who during the relevant period always held the role of TBN's vice president for engineering, oversaw the technical functions of NMTV's full power broadcast stations as well as the operations of NMTV's low power operations. Bureau PFCs at pp. 41-42, 44, 51, 58-59, 145-46. It is fair to conclude that Duff's and Miller's activities on behalf of NMTV were performed as part of their TBN job duties. Bureau PFCs at p. 146. It is also fair to conclude that, because there had been no prior record of discussions about a station's budget or hires, the involvement of NMTV's board in discussing and approving the hiring of a part-time production assistant in May 1992 (see Trinity PFCs at pp. 102; 410), was simply a reaction to Borowicz' petition. Finally, it is fair to conclude that the sharing of consultants was not due to some conscious decision on the part of TBN's and NMTV's boards of directors. Rather, the sharing of consultants, especially in the lptv area, occurred because NMTV was functioning as a division of TBN. See Bureau PFCs at pp. 58-59; Glendale PFCs pp. 152-56. Hence, TBN had and exercised control over NMTV's personnel.

20. In the area of finances, the evidence establishes that NMTV was treated almost exactly like Community Educational Television ("CET"), the Trinity owned and operated company that holds licenses for noncommercial educational television stations in Harlingen, Beaumont and Houston, Texas. Thus, NMTV, like CET, initially received money on an as-

needed basis from TBN without the formality of a note or security agreement, while the indebtedness was carried on TBN's books and reflected on TBN's financial statement in an NMTV column. Bureau PFCs at pp. 5, 26-29; Glendale PFCs at pp. 130-32; Jt. Ex. 1, p. 28; MMB Ex. 86, pp. 27, 29, 31. Beginning with calendar year 1988, when NMTV had its own operating television station, NMTV, like CET when it acquired an operating station, no longer appeared on TBN's financial statement. Bureau PFCs at pp. 27-28; MMB Ex. 93, p. 4. Rather, NMTV had a separate financial report which was prepared by TBN personnel and consultants. Glendale PFCs at p. 141; Trinity PFCs at p. 166. Further, once NMTV's Odessa and Portland television stations became operational, TBN's accounting department handled the contributions received by TBN from areas served by NMTV. Glendale PFCs at pp. 144-45; Trinity PFCs at p. 165. TBN's practice of informally giving money to NMTV on an as-needed basis did not change until after the Borowicz petition, when NMTV executed a promissory note for funds lent by TBN for the proposed purchase of the Wilmington television station. Bureau PFCs at pp. 40-41, 46, 50, 53, 55; Glendale PFCs at p. 147; Trinity PFCs at pp. 167-68. The only other note executed by NMTV relative to its indebtedness to TBN bears a date of January 1, 1993, the same date CET executed a note relative to its indebtedness to TBN. Glendale PFCs at pp. 146-48; Trinity PFCs at pp. 167-68; Jt. Ex. p. 28.

21. Of greater significance, however, than the manner in which TBN dispensed money to NMTV are the reasons money was advanced or not made available. The evidence reflects that a virtually unlimited fund was available to NMTV if the expenditure would

advance the goals of TBN. Bureau PFCs at pp. 38-39, 52, 141, 143; Glendale PFCs at pp. 49-50. Conversely, if loaning or giving money to NMTV did not serve TBN's interest, the money would not be lent. Bureau PFCs at pp. 28-29, 35, 143; Glendale PFCs at p. 313. Indeed, the subject of a loan would not even be discussed. Bureau PFCs at pp. 29, 32. It is thus fair to conclude that TBN, as NMTV's banker, basically dictated what projects NMTV would and would not pursue. Hence, TBN had and exercised control over NMTV's finances.

22. With respect to possible control of NMTV's board of directors by Crouch and TBN, it is apparent that the parties agree about many basic facts. Thus, the parties agree that NMTV's bylaws are different from those of TBN. Specifically, NMTV's bylaws allow for the removal of the director holding the office of president by a simple majority vote, while those of TBN afford significant protection to the director holding the office of president. Bureau PFCs at pp. 7, 11; Glendale PFCs at p. 10; Trinity PFCs at pp. 23-26. The parties further agree that joint meetings of the boards of TTI and TBN and affiliated corporations occurred between 1982 and 1987, and that, beginning in 1988 through 1992, NMTV held annual meetings of its board of directors separate from those of TBN but at the same time and the same locale as the annual board meetings of TBN and its affiliated companies. Bureau PFCs at p. 25; Glendale PFCs at p. 35. There is also no significant dispute as to the identity of NMTV's assistant secretaries and the reasons for their selection; namely, to sign checks and documents in accordance with their responsibilities at TBN. Bureau PFCs at pp. 25, 35; Glendale PFCs at pp. 35, 45, 47-48, 81-2; Tr. 2637-38.

Likewise, there is no dispute that Crouch was president of TTI/NMTV, just as he was president of TBN and of each of the Trinity-named owned and operated companies. Bureau PFCs at pp. 10, 14-15, 135; Trinity PFCs at p. 22 n. 18, 430-31. The record plainly reflects that on two occasions Crouch's proposal to sell NMTV's Odessa station was opposed by both Duff and Espinoza. Bureau PFCs at pp. 40, 42; Glendale PFCs at pp. 53-55; Trinity PFCs at pp. 30-33. Finally, the evidence is clear that, among NMTV's directors, Duff has had the most significant role in monitoring the day-to-day activities of NMTV's stations and that the amount of time spent on NMTV matters has no impact on her TBN salary. Bureau PFCs at pp. 44, 51, 58, 61; Trinity PFCs at pp. 42-48.

23. Where the parties differ is whether the foregoing events, as well as other events which will be discussed below, mean that Crouch and TBN exercised *de facto* control over NMTV. The Bureau submits that, in order to properly assess the evidence and draw the appropriate inferences, it is necessary to focus on the context in which various actions and events occurred. Likewise, it is more significant to consider what the various players did and refrained from doing rather than giving much weight to after-the-fact, self-serving explanations.

24. Thus, with regard to the differences between the bylaws of TBN and NMTV, all that is clear about the events leading up to the drafting and adoption of NMTV's bylaws is that Duff and Espinoza had no role whatsoever and that neither Crouch nor Juggert perceived a need to protect Crouch's role as president of NMTV. Bureau PFCs at pp. 11-12; Glendale

PFCs at pp. 10-11. Thus, there is little, if any, credible evidence to support an inference that those differences are significant or that the bylaws were written as they were in order to give the minorities on NMTV's board the power to remove Crouch (or any other white director) whenever it suited their desire to do so. In any event, the record reflects no effort by any of NMTV's minority directors, either to remove Crouch as a director or as president, or add minorities to the NMTV board. Indeed, on the one occasion when a board member (Hill) was added, that action occurred because Crouch apparently acted on advice provided by TBN's counsel that another director be added to NMTV's board. Bureau PFCs at p. 65. It thus appears that, while the minority board members had the legal power to control NMTV's board, the person who actually exercised control was none other than Crouch.

25. Prior to the time NMTV sought a full power station in 1987 pursuant to its interpretation of the multiple ownership rules, the corporation held board meetings only in conjunction with the annual board meetings of TBN and other Trinity-named companies. After NMTV obtained a construction permit for a full power television station in Odessa, it began to hold separate meetings, while its annual meetings continued to occur at the same time and place as the annual group meeting of the boards of directors of Trinity-named companies. NMTV's separation from the annual group meeting, which occurred apparently because May so advised (see Bureau PFCs at p. 74), suggests that NMTV was viewed as being somewhat different from the Trinity owned and operated companies. However, there is no credible evidence that anyone other than May saw the need for NMTV to hold separate annual meetings or, more importantly, to develop a plan or timetable for NMTV to stand on

its own, apart from Trinity. Bureau PFCs at pp. 74-75. Thus, the fact that NMTV began in 1988 to hold its annual meetings somewhat apart from the group meeting of Trinity companies is only marginally helpful in answering the question of who controlled NMTV.

26. As noted above, there were at least two occasions when Crouch's expressed wishes relative to NMTV's Odessa station were opposed by Duff and Espinoza. In addition, Trinity cites two other instances -- one relating to an offer for a building in Portland (Trinity PFCs at pp. 75, 131-32, 215, 435), and the other relating to the decision to sell an unbuilt construction permit for a low power station in Stafford (Houston), Texas (Trinity PFCs at pp. 34-39, 435) -- as proof that Crouch and TBN did not control NMTV. These incidents certainly show that Crouch did not always get his way. However, they are insufficient to support the conclusion that Crouch and TBN did not exercise *de facto* control over NMTV.

27. The evidence suggests that the cited incidents show little more than that Crouch simply chose not to contest matters of marginal importance. In this regard, the Bureau has fully stated its views relative to the Odessa station sale. Bureau PFCs at pp. 40-43, 142-43. As for the Portland studio offer, it is fair to infer that none of NMTV's directors had any knowledge about the condition of the building or the Portland real estate market to have anything more than a "gut feeling" as to what should be offered. See Trinity PFCs at p. 75. Thus, the fact that Crouch wished to limit NMTV's offer for the building to no more than \$400,000, rather than the \$500,000 ultimately voted for by Duff and Espinoza, is of minimal significance. In any event, NMTV paid only \$425,000 for the building. Bureau PFCs at pp.

28. With respect to NMTV's failure to construct its television translator station at Stafford, Texas, the Bureau notes at the outset that this was the only translator application filed by TTI (out of 17 such applications) which the Commission granted. TTI had filed that application on December 5, 1980. Apparently, it was forgotten in the ensuing years for there is no evidence in the record of a certification concerning minority and/or diversity preferences (MMB Ex. 72) relative to that application, and there was no amendment to change the name of the applicant from TTI to NMTV. Thus, when the Commission issued the construction permit for the Stafford facility on January 29, 1988 (MMB Ex. 180), it likely came as a surprise to NMTV. While NMTV ultimately sought and received authority to construct at a new site (TBF Ex. 124, pp. 4-20), there appears to have been no real effort to build the station. In this regard, the record contains no evidence of the type of activity regarding the Stafford facility that accompanied the contemporaneous grant of NMTV's Fresno lptv application, or the subsequent grants of translator applications for Columbus, Ohio; Salt Lake City, Utah; and Charlotte, North Carolina.³ See Bureau PFCs at pp. 57-58. Indeed, the record demonstrates that NMTV chose to begin construction activity on the Columbus translator station less than three weeks after Duff decided not to build the Stafford translator station. Compare MMB Ex. 255; TBF Ex. 101, Tab A. Moreover, shortly before Duff transmitted to May the contract and application for the sale of the Stafford permit in

³ It should be noted that the Columbus and Salt Lake stations began transmitting in 1990, not 1989, as stated in ¶ 104 of the Bureau's PFCs.

April 1989, the NMTV board had considered possibilities for expansion, and NMTV had filed five applications for additional television translator stations. MMB Ex. 230; MMB Ex. 247.

29. In short, the disagreement between Crouch and Duff over whether to sell the Stafford station or build it and then sell it later had virtually nothing to do with NMTV. Rather, the more likely explanation is that Duff, as the person in charge of TBN's low power operations (Bureau PFCs at p. 58), made the sensible decision not to build the Stafford facility because devoting resources to its construction did not make much sense. The area in question already was receiving TBN programming from CET's Houston station. Constructing the Stafford facility and collecting money for TBN that might otherwise go to CET would have been contrary to the interests of CET, on whose board both Duff and Crouch presided. Bureau PFCs at p. 27. It therefore seems implausible that Crouch felt strongly about the need to build a modest translator facility which would virtually be repeating the TBN programming already on the air simply to carry TBN's telethons. Further, given these circumstances, Espinoza would have had no role, and no basis for meaningful input, in deciding whether the Stafford facility should be built. See Glendale PFCs at pp. 63-65.

30. According to Trinity, the ultimate question in resolving whether Crouch and/or TBN exercised *de facto* control over NMTV is whether Duff acted independently of Crouch or as his agent when she performed her role as a director of NMTV. Trinity PFCs at p.

440. Not surprisingly, Trinity concludes that Duff was independent. To support that conclusion, Trinity cites those rare instances where Duff did not agree with Crouch with respect to a matter concerning NMTV's affairs. Trinity PFCs at pp. 440-44. However, given Duff's continued roles at TBN, it is virtually impossible to conclude that Duff's activities on behalf of NMTV, including the few times Duff opposed Crouch's desires, were not the result of her assessment of what would be in the best interests of *TBN*. Thus, Duff's purported independence as an NMTV board member does little to support a conclusion that Crouch and/or TBN did not exercise *de facto* control over NMTV since Duff, during the entirety of her tenure as NMTV board member, also had a fiduciary responsibility to TBN. See Bureau PFCs at p. 144.

3. Trinity's abuse of process

31. At p. 448 of its PFCs, Trinity argues that "the issue of control was exceptionally more complex than usual given the unique legal and factual circumstances under which the relationship between TBN and NMTV developed." At pp. 462-63 of its PFCs, Trinity asserts that TBN's relationship with NMTV arose under a newly developed Commission policy that invited group owners to provide substantial managerial, technical, and financial assistance but offered no clear guidance as to when such assistance would implicate the Commission's amorphous *de facto* control guidelines. Trinity thus posits that even if Crouch and/or TBN exercised *de facto* control over NMTV, no abuse of process occurred and no forfeiture or other sanction is warranted. Trinity PFCs at pp. 471-72, 477-80. The Bureau disagrees.

32. The question as to whether TBN exercised *de facto* control over NMTV has its origins in the circumstances surrounding the creation of TTI and its later metamorphosis into NMTV. As the evidence shows, TBN, or more specifically, Crouch, essentially created TTI to serve his desire to acquire additional outlets for TBN's programming. Bureau PFCs at pp. 8, 135. Considering how TBN and its agents and consultants viewed and treated TTI over the ensuing years, it is crystal clear that TBN controlled TTI. Bureau PFCs at pp. 15-18, 28-29. Likewise, when, *and only when*, TBN reached the limit on the number of full power commercial television stations it could hold, TBN, or more specifically, Crouch, after receiving a simple, oral "OK" from his lawyer, caused TTI to become NMTV and to change its fundamental purpose so as to allow TBN to acquire and operate two more stations.⁴ Bureau PFCs at pp. 32-33, 38-39. In those instances and without clearly informing the Commission, Crouch/TBN/NMTV took the totally unwarranted position that *it did not matter* who had actual working control over NMTV. Bureau PFCs at pp. 22, 33, 54-55.

33. Thus, there is no reason to believe that TBN, NMTV, and their joint counsel, ever seriously concerned themselves, prior to the Borowicz petition to deny, with the niceties of what the Commission would or would not allow TBN to do for NMTV. Indeed, prior to NMTV's "Petition for Declaratory Ruling," (Glendale Ex. 216) and the hiring of attorney Tyrone Brown in early 1992 (Trinity PFCs at pp. 112-13), the record is devoid of any evidence that NMTV or TBN made any effort to confirm what the Commission would accept

⁴ In addition, TBN had NMTV resume efforts to acquire television translator or lptv stations *solely* through the filing of applications for construction permits. Bureau PFCs at pp. 56-59.

with respect to their relationship. In this regard, the applications that NMTV filed for full power television stations in Odessa, Portland and Wilmington never informed the Commission that a relationship between NMTV and TBN *even existed*. Bureau PFCs at pp. 37-38, 47-48, 53-54. At the most, only the Wilmington application provided a hint of the NMTV/TBN relationship by informing that both corporations shared various officers. Bureau PFCs at pp. 53-54.

34. In short, Trinity cannot excuse its statutory and rule violations with the argument that the law was too difficult to ascertain or that it misunderstood the law. Cf. Bay Television, Inc., 9 FCC Rcd 3299 (1994) (The Commission imposed a forfeiture for a rule violation notwithstanding the claim that the violation occurred because an inexperienced employee did not count bartered time in determining whether a limit had been reached concerning commercial time in two blocks of children's programs.) Trinity did not follow the law because it never seriously looked to see what the law required. In this regard, Trinity simply ignored the plain meaning of Note 1 of Section 73.3555 of the Commission's Rules and ignored Commission case law concerning *de facto* control. Bureau PFCs at pp. 33, 153-55.

35. The Bureau agrees with Trinity that NMTV's failure to disclose the nature and extent of its relationship in its applications, when considered with contemporaneous disclosures in other submissions to the Commission, indicates that NMTV's omissions did

not occur because of an intent to deceive the Commission.⁵ See Trinity PFCs at pp. 456-58. Thus, the Bureau believes that loss of TBF's license is *not* the appropriate sanction. Bureau PFCs at p. 159. Nevertheless, the Bureau submits that the Commission cannot completely exonerate TBN and NMTV on the basis that Crouch's and TBN's exercise of *de facto* control over NMTV and the related abuses of process by NMTV arose solely because their lawyer blundered. In this regard, the abuses occurred not only because counsel erred. The abuses occurred, in part, because Crouch did not question May's dubious advice as to what the Commission's rules permitted and because Crouch did not carefully review the NMTV applications to acquire full power commercial television stations to ensure that they contained the kind of disclosure he understood the Commission should have. See Bureau PFCs at pp. 37-38, 47, 155; Glendale PFCs at pp. 37-42, 45-46, 67-68, 106-07. With his recent experience involving misstatements in the KTBN-TV renewal application (S.A.L.A.D. Ex.

⁵ Trinity seeks to expand on this argument by claiming that, during the five years prior to the Borowicz petition to deny, it had filed over 80 documents with the Commission that showed *Duff's* association with TBN. Trinity PFCs at pp. 460-61. The documents are not as enlightening as Trinity suggests. The bulk of the documents reveal no more than that a person named Mrs. Jane Duff, or Jane Duff, will be receiving copies of TBN applications or had witnessed the signing of a purchase agreement for a television translator construction permit or station. TBF Ex. 122, pp. 1, 22-24, 40, 48-49, 51-56, 73, 80-82, 84, 88-112, 129, 138-39, 141-43, 145-52, 165-69, 188, 199-206, 224, 234-49. With respect to the KTBN-TV renewal application, which was filed on July 29, 1988, the document reveals only that Jane Duff, the "Administrative Assistant to the President" is the person primarily responsible for the station's EEO program. TBF Ex. 122, pp. 158, 160. Only with respect to the ownership report for CET filed November 13, 1989, is it revealed that Jane Duff, a businesswoman, is a director of both CET and NMTV, and an employee of TBN. TBF Ex. 122, pp. 252-5. Prior to the opposition to Borowicz' petition to deny, *NMTV* had made no such disclosure about Duff. Bureau PFCs at p. 54. Interestingly, the CET ownership report asserts that CET is not "formally" under the control of any other organization or corporation, although several of the corporation's officers and directors are officers and directors of other broadcast licensees. TBF Ex. 122, pp. 253-54.